POINT 1

Since the Petitioner failed to prove his case as a matter of law, he was not entitled to have his case submitted to the jury and, therefore, he was not deprived of his rights either under the Constitution of the State of New York or the Constitution of the United States.

The law is well established in the State of New York that the Court is entitled to grant judgment to the parties without submitting a case to the jury if there is no issue of fact to be presented to the jury. A litigant has never been entitled to have a jury determine his allegations where he failed to prove them as a matter of law. *Blum* v. *Fresh Grown Preserve Corp.*, 292 N. Y. 241. Moreover, Section 4401 of the Civil Practice Law and Rules of the State of New York makes specific provision for a motion for judgment as a matter of law after the close of the evidence as does Rule 50 of the Federal Rules of Civil Procedure.

This Honorable Court has ruled on the question frequently and without equivocation. It has been held that the direction of a verdict is eminently proper when it would be the duty of the Court to set aside a different verdict if one were rendered. *A. B. Small Company* v. *Lanborn & Company*, 267 U. S. 248; *Delaware, Lackawanna & Western Railroad Company* v. *Converse*, 139 U. S. 469; *North Penn. Railroad* v. *Commercial Bank*, 123 U. S. 727.

It is abundantly clear that the Trial Judge acted, in accordance with his duty, on the basis of these well established precedents. First of all, he gave the Petitioner ample opportunity to prove his case. (Of great interest in this connection is the final comment made to the Court by Counsel for the Petitioner that "the most gracious manner in which the Court has afforded the plaintiff every opportunity to establish his case is completely appreci-

ated" (RA-249, RA-250)). Then in the highest traditions of our judicial system, he carefully considered Petitioner's rights before taking the case from the jury. In granting the motion, he cited a legal text to the effect that the Court "must decide whether, giving weight to the constitutional right of the jury to decide disputable issues of fact, and considering the wide variation possible in evaluating credibility and in assessing the probative force of conflicting possible inferences, a responsible person might possibly find for their party, if it concludes in the affirmative the case should go to the jury. If the conclusion is in the negative then it should grant a motion for jugdment." (RA—246).

Petitioner claims that his constitutional rights to a trial by jury have been violated. The decisions of this Honorable Court with respect to the Federal Courts and the Seventh Amendment are determinative of this claim since Petitioner's rights could not conceivably be any greater under the Fourteenth Amendment and Mr. Justice Rutledge, speaking for this Court, succinctly rejected the theory that the Seventh Amendment prohibited a directed verdict:

> "If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century." *Galloway* v. *United States*, 319 U. S. 372, 389.

POINT 2

All of the causes of action in the complaint against the Respondent Ornstein were clearly barred by the Statute of Limitations and the Court, therefore, properly granted judgment to that Respondent at the close of the entire case.

It is clear that any action against the Respondent Ornstein based on either malpractice or breach of contract is barred by Section 50 of the Civil Practice Act of the State of New York which provided that actions for malpractice had to be begun within two years and that actions for breach of contract had to be commenced within six years from the time that the cause of action accrued. Of course, this action was not started until almost 11 years had elapsed.

Petitioner, however, relies on allegations that Respondent Ornstein was guilty of fraud and that the Statute of Limitations would not commence to run until the Petitioner had discovered the alleged fraud.

It is not necessary here to determine whether or not a plaintiff can avoid the applicable malpractice Statute of Limitations by purporting to plead his case in fraud. For, in any event, there is absolutely no proof in this case that Dr. Ornstein in any way committed fraud with respect to Mr. Vassos. The Petitioner did not offer one scintilla of evidence to prove that when Dr. Ornstein made his diagnosis of diaphragmatic hernia, he was not acting in good faith nor is there any evidence that he deliberately misstated or misled the Petitioner as to the diagnosis which he made. As a matter of fact, the Petitioner himself testified that he had no conversations with Dr. Ornstein about the diagnosis, that Dr. Bozes had to tell him what the finding was because he wasn't able to speak English (RA–73); and the record is equally devoid of any proof that

Dr. Ornstein made any misrepresentations following the operation. In fact, Mr. Vassos testified that he saw Dr. Ornstein only on two occasions (RA–76); the second and last occasion on which he saw him was December 27, 1949 (RA–73) which was over a month before the operation was performed. He did not see Dr. Ornstein at the operation (RA–77) and it must certainly be concluded that he did not see him thereafter. In the absence of any proof at all of fraud the Trial Court was completely justified in finding that the Statute of Limitations was a complete defense to the Petitioner's causes of action against Dr. Ornstein, as a matter of law and this was so even without reference to Respondents' Exhibits I and J (RA–191, RA–195).

If any further proof were needed, Respondents' Exhibits I and J clearly reveal that Christos Vassos was advised after the operation was performed that his lung had been removed because of tuberculosis. In Exhibit I the statement is made that "after the operation, I was informed that the lower lobe of my left lung had been removed because of tuberculous pathology". And, in Respondents' Exhibit J, Dr. Lercher, an associate of Dr. Ornstein's, replied to Mr. Vassos that, "on the operating table, a mass was found in this area which apparently, on clinical observation before this operation, was thought to be a hernia and was found to be a tuberculous infection" (RA–194); this letter was dated May 22, 1951, which was more than nine years before this action was commenced.

Petitioner's only evidence, therefore, was that Dr. Ornstein made a pre-operative dignosis or impression of diaphragmatic hernia and that this condition was not found at time of surgery. Certainly as a matter of law, allegations of fraud could not be sustained on this evidence alone.

Petitioner further urges that the Trial Court should have applied the doctrine of *res judicata* on the basis of Mr. Justice Nathan's decision denying the Respondent

Ornstein's motion to dismiss the action on the grounds that the same was barred by the Statute of Limitations. It is manifest that Mr. Justice Nathan's decision in no way set forth the law of the case (A–30, A–31). Mr. Justice Nathan assumed, as he had to for the purposes of the motion to dismiss, that the allegations of fraud contained in the complaint of the Petitioner were true. If he had decided as a matter of law that the Statute of Limitations could not be a valid defense at the time of trial, there would have been no point in granting leave to the Respondent Ornstein to plead the defense in his answer (A–31).

POINT 3

There is no proof in the case that the Respondent Ornstein departed from proper and approved practice or that any alleged departure was a competent-producing cause of the Petitioner's injuries.

While the Trial Court based its judgment on the fact that the affirmative defense of the Statute of Limitations was a complete defense to the causes of action, if any, against Dr. Ornstein, it can also be said that the Petitioner totally failed to make out a *prima facie* case against the Respondent Ornstein on the allegations of professional negligence.

There is no evidence that, in arriving at his diagnosis of diaphragmatic hernia, the Respondent Ornstein departed from proper and approved practices. In fact, the Petitioner's expert witness, Dr. George Simmons, testified that he did not see the films on which Dr. Ornstein made his diagnosis and he could make no comment as to what Dr. Ornstein found on those films. He had no knowledge of that at all (RA–56). He further testified that a diaphragmatic hernia would require surgery since there was no other way to cure it and that if a doctor had an impression based on his studies that a condition of diaphragmatic hernia existed,

it would be good practice to refer the patient for surgery and that would be so even though at time of operation a diaphragmatic hernia was not found (RA–55). Having referred the patient to a surgeon, it was consistent with standard and approved methods of practice to leave it up to the surgeon as to what, in his judgment, should be done at the time of the surgery (RA–56).

As has been stated before, the Trial Court did not base its determination upon the lack of affirmative proof of negligence, yet it is apparent that the Trial Court did not find that there was any proof of such negligence. In the course of the arguments on the motion to dismiss, the Court said, "Frankly, I can't see that there is any evidence whatsoever from which any trier of the fact would be justified in finding impropriety or fraud on the part of Dr. Ornstein. I can't see it at all. What he did, he did in accordance with the established practice and certainly he did the correct thing when he found a condition which appeared even as if it might call for surgery in referring this man to a surgeon" (RA–235). Further, Petitioner impliedly consented to the dismissal of the first and second causes of action against the Respondent Ornstein. In the course of the arguments on the motion to dismiss, counsel for the Petitioner agreed that the first and second causes of action could be treated identically as if they were one cause of action (RA–231). Then the following colloquy occurred between the Court and counsel for Petitioner:

> "The Court: All right, so that the first concerns itself with the operation and the sequellae of the operation, the fourth relates to the diagnosis?
>
> Mr. Rassner: Yes, your Honor.
>
> The Court: Now, what has the first cause of action got to do with Dr. Ornstein, really?
>
> Mr. Rassner: Nothing.
>
> The Court: All right. So we will forget the first cause of action and also the second as respects Dr. Ornstein. They are dismissed out of hand" (RA–232).

CONCLUSION

The Respondent Ornstein respectfully prays that the petition for a writ of certiorari be in all respects denied.

Respectfully submitted,

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Attorney for Respondent Ornstein.

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Supreme Court of the United States

October Term, 1966

No. 358

CHRISTOS VASSOS,

Petitioner,

against

CLAIRE ORNSTEIN, as Executix of the Estate of GEORGE G. ORNSTEIN, deceased, and IRVING SAROT,

Respondents.

BRIEF OF RESPONDENT, SAROT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MARTIN FOGELMAN,
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Irving Sarot.

THOMAS GRIMES,
THOMAS J. WALSH,
On the Brief.